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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 411

BARNARD-CURTISS COMPANY and THE SEABOARD SURETY COMPANY, Surety, Petitioners,

vs.

THE UNITED STATES OF AMERICA, for the use and benefit of D. W. FALLS CONSTRUCTION CO., and ACE CONSTRUCTION CO., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on July 1, 1958.

CITATIONS TO OPINIONS BELOW

The memorandum of the United States District Court

for the District of New Mexico is unreported and may be found in the printed record. The first opinion of the Court of Appeals, printed in Appendix A hereto, infra, Page 10, is reported in 244 F. 2d 565.

An interlocutory opinion of the Circuit Court of Appeals is reported in 252 F. 2d 90. The last opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, Page 15, is unreported at this time.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1958. Petition for rehearing, filed July 21, 1958, was denied July 24, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. When a duty arises from a written contract, in which the promisor assumed an unqualified liability and in the making of which he was presumptively free to stipulate for any desired exception, and yet made no exception on account of liability arising from an act of God, will the happening of such an occurrence and its consequences support a defense to an action against him for breach of his contractual obligations?

2. In an action brought under the Miller Act (40 U. S. C. A. 270 [a]--270 [b]), should a Federal Court apply the law of the state in which the contract was to be performed on the issue of the consequences of an act of God?

3. On the second appeal, the Court of Appeals held that since the judgment for respondents was not questioned on the second appeal, it would be affirmed. We believe that there is no basis in the record to support this ruling.

STATEMENT

On May 23, 1956, respondents filed an action in the United States District Court for the District of New Mexico to recover the balance due them under subcontracts with petitioner, Barnard-Curtiss Company, who held a prime contract with the federal government for an irrigation system in that state. Barnard-Curtiss Company counterclaimed, alleging damage by reason of the failure of the respondent, Falls, to complete its contract within the time specified. The contract carried a completion date of December, 1954. Respondents were endeavoring to complete their contracts when, on May 17, 1955, a heavy rain caused severe flood damage to the structures.

The District Court granted judgment to Falls and Ace for the amounts retained by Barnard-Curtiss and for the reasonable value of their services in rehabilitating structures damaged by the flood. The counterclaim of Barnard-Curtiss was dismissed with prejudice.

On appeal before Judges Huxman, Bratton and Murrah, the Court of Appeals for the Tenth Circuit reversed and remanded the case to the District Court for the entry of an additional finding of fact which they held to be determinative of the case. In that opinion, written by Judge Huxman, the Court held that if Barnard-Curtiss was negligent in completing the preliminary work, and this negligence was, of itself, sufficient to delay completion of the subcontracts beyond the date of the flood, then the judgment of the District Court would be affirmed; otherwise, Barnard-Curtiss was to be awarded judgment on its counterclaim since the respondents should be held for the consequences of the flood.

On remand, the trial court found that the delay in the completion of the subcontracts was solely due to Barnard-

Curtiss. An appeal was taken challenging the existence of any evidence to support the additional finding of fact.

On the second appeal, before Judges Breitenstein, Bratton and Phillips, the Court of Appeals sustained petitioner's contention that the record contained no evidence to support the added finding but, nevertheless, affirmed the judgment for Falls and Ace. The judgment dismissing the counterclaim was reversed and remanded to the District Court with instructions to ascertain and allow recovery of such additional expense as might be found to be due from the subcontractors' failure to complete their work on December 31 but not to include damages or expenses subsequent to the flood of May 17, 1955.

REASONS FOR GRANTING THE WRIT

I

In its first opinion, the Court of Appeals held that unless Barnard-Curtiss was the sole cause for respondents' delay, it could recover for all damage sustained by reason of the respondents' failure to complete their contracts within the time specified; that the fact of the flood did not relieve them of their obligation to perform. The ruling stated:

> "* * * The law is well established that the intervention of an act of God does not excuse performance of an existing contract unless loss resulting therefrom is excepted in the contract from the assumed liability."

In support of the ruling, this panel of the Court relied upon *Broderick Wood Products vs. U. S.* (Tenth Circuit, 1952), 195 F. 2d 433, and *Berg vs. Erickson* (Eighth Circuit, 1916), 234 F. 817. In the *Broderick* case the Tenth Circuit held:

> * * * But with certain exceptions and qualifications having no material bearing here, it is well settled that where one voluntarily enters into a positive agreement binding himself absolutely to perform a lawful and possible act within a specified time, he is not relieved of that duty or absolved from liability for failure to fulfill the covenant by a subsequent impossibility caused by an act of God."

Notwithstanding this holding, on the second appeal a different panel of the Court reversed the decision by holding that no damage suffered after the date of the flood could be recovered by your petitioners. The only authority cited for this limitation was *Hadley vs. Baxendale*, 156 Eng. Reprint 145, 5 Eng. Rul. Cas. 502. Since both opinions are based on identical facts, we know of no basis under which the two decisions may be reconciled.

The later decision is directly in conflict with the rule announced in other jurisdictions. *Tennessee Electric Power Co. vs. White County* (Sixth Circuit, 1931), 52 F. 2d 1065; *Southern Railway Co. vs. White* (Sixth Circuit, 1922), 284 F. 569; *Robson vs. Mississippi River Logging Co.* (Eighth Circuit, 1893), 61 F. 893, affirmed 69 F. 773, 16 C. C. A. 400; *U. S. vs. Lewis* (Eighth Circuit, 1916), 237 F. 80.

In the *Southern Railway Co.* decision, supra, the Sixth Circuit held:

> * * * When a duty arises from an express contract, in which the promisor assumed an unqualified liability and in the making of which he was free to stipulate for any desired exceptions and yet made no exception on account of liability from an act of God, the existence of such act and of its consequences will

not support a defense to an action against him for breach of his promise."

Moreover, the second panel of the Court of Appeals failed to follow numerous decisions of this Court which appear to be applicable to the present situation. *The Harriman* (1870), 9 Wall. 161, 172, 173; 19 L. Ed. 629; *Jones vs. U. S.* (1878), 69 U. S. 24, 29, 24 L. Ed. 644; *Jacksonville vs. Hooper* (1896), 160 U. S. 514, 528, 16 Sup. Ct. 379, 40 L. Ed. 515; *Phoenix Bridge Co. vs. U. S.*, 31 Ct. Cl. 492, affirmed (1908), 211 U. S. 188, 29 Sup. Ct. 84, 53 L. Ed. 141; *Dag vs. U. S.* (1917) 245 U. S. 159, 38 Sup. Ct. 57, 62 L. Ed. 219.

The contract in question is a standard form agreement adopted by an association for its members and made available to the construction industry. By its terms, the obligation to perform is unconditional. Such unconditional obligations have heretofore provided certainty to the scope of performance in an industry otherwise amply hazardous.

The rule announced by Judge Breitenstein clearly affords an escape from an otherwise unconditional obligation, and may logically be applied to relieve any contracting party from his established duty.

Certainly, uniformity within this circuit and between circuits on so broad a principle of law is plainly in the public interest.

II.

The heart of the problem arises under the doctrine announced in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, holding that there is no federal general common law; that a federal court should apply the state law on all questions not governed by the Constitution, treaties or statutes of the United States. (See also *Klaxon vs. Stentor Electric*

Mfg. Co. (1941), 313 U. S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477.)

In actions brought under the Miller Act, two other circuits, following the above rule, have applied the state law on non-federal questions. *Continental Casualty Co. vs. Schaefer* (Ninth Circuit, 1949), 173 F. 2d 5, cert. denied, 337 U. S. 940, 69 Sup. Ct. 1517, 93 L. Ed. 1745; *Aetna Casualty and Surety Co. vs. B. B. B. Const. Co.* (Second Circuit, 1949), 173 F. 2d 307.

The liability of a subcontractor to his principal for the consequences of an act of God is not related to the Constitution, treaties or statutes of the United States. It should, therefore, be governed by the law as announced by the highest state court of the state in which the contract was to be performed.

On the first appeal, the court followed the rule announced by the Supreme Court in New Mexico, the state of the place of performance. In *Perea vs. Ilfeld* (1928), 33 N. M. 445, 270 P. 884, the New Mexico Supreme Court passed upon the question:

> "* * * Does the snow storm, 'the act of God,' under such circumstances excuse the defendant and discharge the contract?"

The Court held that the act of God which prevented the defendant from returning sheep belonging to the plaintiff constituted *no defense* in an action for breach of the contract. In support of their decision, the Court cited *Berg vs. Erickson*, 234 F. 817, also cited by the first panel of the Court as authority for its decision.

The second panel of the Court of Appeals failed to honor the New Mexico law and relied instead on only one case, *Hadley vs. Baxendale*, supra. Nowhere in this decision can there be found a reason for this departure, nor

was either party notified that the prior decision was not to be followed.

The federal courts have *exclusive* jurisdiction over litigation arising under the Miller Act. The vast public works program, presents problems involving thousands of contractors throughout the nation. The interests of the public and of the entire construction industry can only be adequately served by uniformity of determination of such problems. This case illustrates perhaps the most basic and important question which may arise; what law is to be followed? The intra-inter circuit conflict begs for clarification.

III

The second panel of the Court of Appeals affirmed the judgment for Ace Construction Company on the sole ground that it had not been questioned on appeal. The record will not support such a holding.

The first opinion held that the judgment for both respondents was subject to affirmance only if the trial court should determine that petitioner was solely responsible for their delay:

> "* * * Whether the fault was sufficient to excuse delay of the completion of the subcontracts beyond the date of the flood is more difficult. Since it is determinative of the case, there should be a specific finding with respect to that fact.
>
> * * * The case cannot be satisfactorily disposed of in the absence of a clear finding with respect to this vital issue. The judgment is, therefore, REVERSED and the cause remanded for further proceeding in conformity to the views expressed herein."

The trial court found that Barnard was solely responsible for respondents' delay. On the second appeal, the sufficiency of the evidence to support the finding was challenged. Since the judgment for Ace was conditioned upon this finding, the issue of the sufficiency of the evidence to support the finding put the judgment squarely in issue.

But on the second appeal, the other panel of the Court ruled that the judgment for Ace had not been questioned, and solely on that basis held "the judgment for Ace may not be set aside."

The fact that the holding of the prior opinion was not followed certainly cannot be used to support a disposition by this method. Clearly, this is the type of departure from the accepted course of judicial procedure contemplated by the provision in Rule 19-1(b).

CONCLUSION

For the reasons expressed herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DARRELL J. SKELTON,
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Counsel for Petitioners.

Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5497—March Term, 1957.

Barnard-Curtiss Company, and The Seaboard Surety Company, Surety, Appellants, vs. The United States of America, for the use and benefit of D. W. Falls Construction Co., and Ace Construction Co., Appellees.	Appeal from the United States District Court for the District of New Mexico.

(April 25, 1957.)

Robert S. Skinner (Robertson & Skinner and Arthur H. Lindeman were with him on the brief) for Appellants.

Owen B. Marron and T. B. Kelehcr (John B. Tittmann was with them on the brief) for Appellees.

Before Bratton, Chief Judge, and Huxman and Murrah, United States Circuit Judges.

Huxman, Circuit Judge.

This is an appeal by Barnard-Curtiss Company, herein called Barnard, from a judgment in favor of D. W. Falls Construction Company, herein called Falls, and a further judgment in favor of Ace Construction Company, herein called Ace. The action was instituted by Falls and Ace

against Barnard under 40 U.S.C.A. 270, et seq. (The Miller Act).

Barnard held a prime contract with the Bureau of Reclamation for the construction and repair of an irrigation system in New Mexico, known as the Vermejo Project. Barnard's project carried a completion date of June 15, 1955. In January, 1954, Barnard subcontracted part of the work to Falls. Falls' subcontract carried a completion date of December 31, 1954. Barnard retained certain of the work under the prime contract to be done by itself. Some of this work was required to be done before Falls could complete its subcontract. After doing some work on its subcontract, Falls subcontracted the balance thereof to Ace. This subcontract contained a completion date of December 14, 1954. The work covered by Falls' subcontract was not completed by December 31, 1954.

Work was still being done under these contracts on May 17, 1955, when a flood of such proportions as to constitute an act of God occurred inflicting serious damage to the project covered by Falls' subcontract and requiring a great deal of rehabilitation work to be done thereafter. Falls did not complete this rehabilitation work and Barnard was required to do so at an additional expense of $38,335.53, for which it has a claim pending with the Bureau of Reclamation.

In the complaint Falls and Ace sought to recover the balance due them for work which they had performed under the subcontracts. Barnard's answer contained a general denial, denying that it owed Falls or Ace anything. It also denied that the plaintiffs had performed the obligations of the subcontract. In addition, Barnard filed a counterclaim in which it alleged that Falls failed to complete its contract by the completion date of December 31,

1954, and that this delay together with the defective manner in which its work was done caused Barnard to do extra work in the amount of $14,285.17, for which amount it sought judgment against Falls.

It is conceded that the decision is hinged to the effect of the flood upon the legal liabilities of the parties to each other. The law is well established that the intervention of an act of God does not excuse performance of a contract unless loss resulting therefrom is excepted in the contract from the assumed liability.[1] This is also the law of this Circuit.[2] The subcontract did not exclude loss occasioned by an act of God. Falls and Ace did not complete their contract by December 31, 1954, and the subsequent intervention of an act of God did not relieve them from the duty of completing their contract and from liability for additional expenses resulting therefrom, unless Barnard was negligent in some of its obligations and that this negligence prevented completion of the subcontracts.

It is appellee's contention that the failure of Barnard to do preliminary work retained by it held them up in their work and without fault on their part prevented them from completing their contract before the intervention of the flood. If sustained by the record, this would be a good defense.[3] The difficulty with this contention is there is no finding by the trier of the facts to this effect. The only finding by the trial court bearing on this question is Finding No. 12, in which the court found that "among the reasons why the sub-contracts of plaintiffs were delayed in completion, according to the *original completion dates*, is

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[1]Williston on Contracts, 1927, Ed. Sec. 1964, p. 3338.

[2]Berg v. Erickson, 234 F. 817; Broderick Wood Products Co. v. United States, 195 F. 2d 433, 437.

[3]152 A.L.R. 1349; 9 Am. Jur., Building and Construction Contracts, Sec. 50.

the fact that the defendant, Barnard-Curtiss, failed to furnish the services required to be furnished by it before the subcontracts could be completed."* This finding means no more than that Barnard's delay prevented completion of Ace's contract by December 14, 1954, and Falls' contract by December 31, 1954. These dates were nearly five months before the flood. This finding is not tantamount to a finding that because of these delays Falls and Ace without fault on their part were prevented from completing their contracts before May 17, 1955. Without such a finding, Barnard was entitled to judgment on its cross-claim. The evidence is in sharp conflict and the ultimate finding depends upon which line of evidence the trier concludes is entitled to the greater weight.

We are not triers of the facts. We do not make findings of fact. We consider only whether the findings are adequate to sustain the judgment. In the absence of a specific finding of the trial court as to whether the delays of Barnard alone were or were not such that it prevented the completion of the subcontracts before May 17, 1955, a final and correct determination of the issues cannot be made.

Barnard's contention that the evidence does not sustain the conclusion that its fault caused delay need not be considered at great length. As stated, the evidence is in sharp conflict. A finding that there was some delay caused by Barnard's fault would find support in the record. Whether that fault was sufficient to excuse delay of the completion of the subcontracts beyond the date of the flood is more difficult. Since it is determinative of the case, there should be a specific finding with respect to that fact.

Barnard's contention that Ace's claim is not a Miller

*Emphasis added.

Act claim lacks merit. The work performed by Ace was a part of the work covered by the prime contract and was work subcontracted by Barnard to Falls. The fact that most of Ace's remaining work was rehabilitation work caused by the flood makes it nonetheless work which must be done under the prime and subcontracts. The court's finding that as to Ace's claim there was an implied contract between Barnard and Ace that Ace do this work and that Barnard was required by his contract to have the work done is well supported by the record. This clearly establishes the claim as a Miller Act claim.

When it became apparent that Falls and Ace would be unable to complete their subcontracts on time, Barnard waived timely completion but did not waive its claim, if any, for damages resulting from such failure to perform. As pointed out, unless its delays in completing preliminary work were such as to prevent appellees from completing their work before the flood of May 17, 1955, Barnard was entitled to recover on its counterclaim. The case cannot be satisfactorily disposed of in the absence of a clear finding with respect to this vital issue. The judgment is, therefore, REVERSED and the cause is remanded for further proceeding in conformity to the views expressed herein.

Appendix B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5741 May Term, 1958

Barnard-Curtiss Company, and The Seaboard Surety Company, Sureties
Appellants,
vs.
The United States of America, for the use and benefit of D. W. Falls Construction Co., and Ace Construction Co.,
Appellees.

Appeal from the United States District Court for the District of New Mexico.

July 1, 1958.

Alfred P. Davis and James L. Tilly (Tilly & Skelton, Wilbur M. Alter, and Arthur H. Lindeman, of Counsel, were with him on the brief) for Appellants.

Owen B. Marron (T. B. Keleher and John B. Tittman were with him on the brief) for Appellees.

Before Bratton, Chief Judge, and Phillips and Breitenstein, Circuit Judges.

Breitenstein, Circuit Judge.

This action under the Miller Act[1] is here for the second time. In the first appeal[2] a judgment in favor of D. W.

[1] 40 U.S.C. §§270a-270e

[2] Barnard-Curtiss Company v. United States, 10 Cir., 244 F. 2d 565

Falls Construction Company[2] and Ace Construction Company[3] was reversed and the case remanded to the trial court for additional findings of fact. After adopting certain additional findings of fact the trial court again entered judgment for Falls and Ace and dismissed a counterclaim asserted by Barnard-Curtiss Company[4] against Falls. Barnard and its surety appeal from that adverse judgment and contend that the additional findings are without support in the record.

On November 27, 1953, Barnard entered into a contract with the United States to do certain construction and repair work on a federal Bureau of Reclamation irrigation system in New Mexico known as the Vermejo Project. The contract completion date was June 15, 1955. By agreement, dated January 28, 1954, Barnard subcontracted to Falls certain work on all the major structures of the project.[5] This subcontract required completion on December 31, 1954.

On June 7, 1954, Falls entered into two subcontracts with Ace covering a portion but not all of the work subcontracted by Barnard to Falls.[6] The Ace subcontracts called for completion on December 12, 1954.

Without going into the maze of arrangements which are difficult to ascertain from a thoroughly unsatisfactory record, it appears that Barnard subcontracted to Falls the general excavation, the concrete work, and the backfilling. Barnard retained for itself two general types of work.

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[2]Hereinafter referred to as Falls and Ace respectively.

[4]Hereinafter referred to as Barnard.

[5]There were eight major structures, viz: Saltpeter Creek Siphon, Vermejo Canal, Eagle Tail Canal Headworks, Willow Creek Wasteway, Crow Creek Drop, Crow Creek Siphon, Curtis Creek Wasteway, and Curtis Creek Check.

[6]The Barnard-Falls subcontract covered 18 items. The two Falls-Ace subcontracts covered a total of 15 items.

The first of these concerned only the Willow Creek Wasteway structure and pertained to the excavation for pipe, the laying of pipe, and the backfilling about pipe. This work had to be done *before* Falls could do the work which it was required to do in connection with the Willow Creek Wasteway. The second related to the installation on various structures of certain riprap and gravel bedding for riprap. This could be done only *after* Falls had completed its subcontract. For the performance of this retained work Barnard entered into subcontracts with C. E. Caldwell and with Charles Denton.

Ace and Falls both failed to complete within the time required by their subcontracts. Work was continuing when, on May 17-18, 1955, an unprecedented storm caused a flood which severely damaged the project structures. Barnard requested an extension of time on its contract completion date and it was extended to August 31, 1955.[1] Work on the project was completed on October 22, 1955. This was also the date of the completion of the work under the Falls subcontract.

Falls sued and recovered judgment for $17,053.76 which represented the balance due on its subcontract plus an item of $1,905.54 for rehabilitation work done by Falls on the Curtis Creek Wasteway structure after the flood. As to this item the court found that there was an agreement between Barnard and Falls whereby Barnard was to pay Falls for this work. The judgment for Falls is sustained by the record.

The claim of Ace was for work done after the flood on the Eagle Tail Headworks and the Willow Creek Wasteway which Ace asserted was within the provisions

[1] The extension was requested May 14, 1955, prior to the flood, and was granted because of "overrun in quantities."

of its contract relating to "Changed Condition." Ace sued for $12,455.27.* The trial court held that there was "an implied or constructive contract" obligating Barnard to pay Ace the reasonable value of its services and materials furnished for such work and, after properly eliminating two overhead items which totalled $4,000.00, gave judgment for Ace in the sum of $8,455.27. While the record as to the arrangements between Barnard and Ace for this work is unsatisfactory and confused, the finding of the trial court in regard thereto is not questioned on this appeal. Under the circumstances the judgment for Ace may not be set aside.

The counterclaim of Barnard against Falls remains to be considered. The basis for this is that Barnard was allegedly subjected to additional expense because of the failure of Falls to complete its subcontract on the agreed date, December 31, 1954. The counterclaim is in the sum of $15,680.92. This is made up of two major items, $14,285.17 shown due from Falls by Barnard's Exhibit 12 and $1,395.75 which was added thereto without objection at the start of the trial. As to the $1,395.75 item the record is completely devoid of any showing as to what it represents other than the statement of Barnard's attorney that it "was overlooked on our books."

Exhibit 12, and the sketchy explanations thereof, disclosed that Barnard asserted a claim for additional costs in connection with the Willow Creek Wasteway, the Eagle Tail Canal and the Curtis Creek Wasteway. The total amount shown due is $29,052.59. Unexplained credits are allowed to bring the amount down to $14,285.17. As the

*This was broken down as follows: repairing upper end of Eagle Tail Headworks to condition prior to flood $774.14; pumping and cleaning lower end of Eagle Tail Headworks as demanded by Bureau of Reclamation for inspection purposes, $7,800.26; similar work on Willow Creek Wasteway, $3,880.87.

record stands, the items covered by Exhibit 12 may be placed into three general groups, viz: costs incurred on account of the flood, costs incurred after December 31, 1954, but not on account of the flood,[9] and expenses on account of the provision of the prime contract for liquidated damages due to failure to complete on time.

In defense of the counterclaim, Falls asserts that it is not liable for additional expense caused by the flood and is not liable for any additional expense so far as the Willow Creek Wasteway is concerned because the delay there was that of Barnard.

The only basis for the counterclaim is the failure of Falls to complete on time. This failure did not ipso facto terminate the contract but subjected Falls to damages for the delay.[10]

The May 17-18 flood was an unprecedented and extraordinary occurrence of unusual proportions and could not reasonably have been foreseen by the parties. The trial court properly found that it was an "Act of God." No recovery may be had from the consequences of the action of natural causes in connection with a breach of contract unless such consequences can be said to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach.[11] The damages arising from the flood did not arise in the usual course of things from the failure to complete on time and

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[9]Ex. 12 covers numerous items which bear a date before that of the flood and other items which cover the whole period January 1—October 22, 1955.

[10]Federal Surety Co. v. A. Bentley & Sons Co., 6 Cir., 51 F. 2d 24, 26; Murphy v. No. 1 Wall Street Corporation, 127 N.Y.S. 735, 736; 9 Am. Jur. Building Contracts §48, p. 36; 17 C.J.S. Contracts §502, p. 1061.

[11]25 C.J.S. Damages §24, p. 487 and particularly notes 61 and 62. Carnegie, Phipps & Co. Limited v. Holt, 99 Mich. 606, 58 N.W. 623, 624.

were not in the contemplation of the parties at the time they made their contract. As they were not foreseeable consequences of the breach, no recovery can be had on account of damages caused by the flood.[12] There was no provision in either the prime or subcontracts relating to the consequences of an occurrence such as the flood. Accordingly, Barnard cannot recover in its counterclaim for any additional expense to which it was put because of the flood.[13]

The findings of the trial court in regard to the Barnard counterclaim are not entirely clear but it appears that the court considered the counterclaim to be based entirely on additional expense caused by the flood. If such be the intended effect of the findings, they are clearly erroneous in this regard. Barnard's Exhibit 12 shows on its face that a number of the claimed items of additional expense were incurred *before* the flood and *after* the December 31, 1954, completion date of the Barnard-Falls subcontract.

After the remand the court found:

> "Solely due to delay in performance by defendant of its work required to be furnished before use plaintiffs could perform under their sub-contract, it was impossible for use plaintiffs to have performed the sub-contract prior to the flash flood of May 17, 1955."

On the record presented this finding is clearly erroneous. The only work retained by Barnard which had to

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[12]15 Am. Jur. Damages §52, p. 451, note 9 and cases there cited: Restatement of the Law of Contracts, Vol. 1, §330, p. 509. This follows the rule in Hadley v. Baxendale, 156 Eng. Reprint 145, 5 Eng. Rul. Cas. 502 which has gained general recognition.

[13]While additional recovery was allowed to Falls and Ace because of work made necessary by the flood, that recovery was based on specific agreements between Barnard and Falls and Barnard and Ace pertaining to such work.

be done before Falls and Ace could perform was the pipe work on the Willow Creek Wasteway. This pipe was laid a day of two prior to the flood. There is no claim that Falls and Ace could have completed their work on this structure between the time when the pipe was laid and the flood. As the delay on the Willow Creek Wastoway was due to the failure of Barnard to complete the preliminary work which it was required to do, Barnard is not entitled to recover any damages for delay in connection with that structure.[14]

To the extent that the counterclaim seeks recovery for items not related to the flood or to the Willow Creek Wasteway, Falls is liable for additional expense to Barnard caused by Falls' failure to complete on December 31, 1954. Such liability of Falls may be diminished by two matters of possible applicability. Barnard requested and obtained from the Bureau of Reclamation an extension of the completion date of the prime contract from June 15, 1955, to August 31, 1955. Also Barnard filed a claim with the Bureau of Reclamation in the amount of $38,335.53 for additional expense. Attached to Barnard's motion for a new trial is an incomplete copy of the decision on this claim. From the record we are unable to ascertain what effect, if any, these two matters have on Barnard's counterclaim.

One matter remains to be considered. Under the prime contract Barnard was obligated to pay liquidated damages, at the amount set forth in the specifications, for failure to complete on the required date. The specifications do not appear in the record. There is no evidence as to what Barnard was required to pay by way of liquidated dam-

[14]Cf. United States v. John Kerns Const. Co., 8 Cir., 140 F. 2d 792, 795 et seq.

ages.[13] It may be that this liquidated damage item should be apportioned between Barnard and Falls. We are unable to say one way or the other because of the condition of the record before us.

The judgment for Falls in the sum of $17,053.76 is affirmed. The judgment for Ace in the sum of $8,455.27 is affirmed. The judgment dismissing the counterclaim of Barnard is reversed and the cause is remanded to the trial court with instructions to ascertain, and allow recovery of, the additional expense, if any, to Barnard properly chargeable to Falls because of its failure to complete on December 31, 1954, and not arising from the flood or from any work done on the Willow Creek Wasteway. The trial court shall also ascertain, and allow recovery of, any portion of the liquidated damage delay penalty properly chargeable to Falls. Costs will be assessed against Falls.

[13] The trial court found that the liquidated damage penalty for delay assessed against Barnard was $3,900.00. The basis of this finding is not apparent. Barnard's Exhibit 16 states that Barnard deducted $2250.00 from an amount claimed due by Falls as "liqudated damages that the bureau have withheld from us because of your failure to complete your contract by December 31, 1954."